No. 97-371-CFX Title: National Endowment For The Arts, et al., Petitioners
v.
Karen Finley, et al.

Docketed: September 3, 1997 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jul 18 1997	Application (A97-68) to extend the time to file a petition for a writ of certiorari from July 30, 1997 to August 29, 1997, submitted to Justice O'Connor.
	Jul 23 1997	Application (A97-68) granted by Justice O'Connor extending the time to file until August 29, 1997.
	Aug 29 1997	Petition for writ of certiorari filed. (Response due October 31, 1997)
	Aug 29 1997	Appendix of petitioner filed.
	Sep 25 1997	Order extending time to file response to petition until October 31, 1997.
	Oct 31 1997	Brief of respondents Karen Finley, et al. in opposition filed.
	Nov 12 1997	DISTRIBUTED. November 26, 1997
	Nov 20 1997	Reply brief of petitioners National Endowment for the Arts, et al. filed.
	Nov 26 1997	Petition GRANTED. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before, 3 p.m., Friday, January 9, 1998. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 6, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 6, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT March 31, 1998. **********
	Jan 5 1998	Brief amicus curiae of Morality in Media, Inc. filed.
	Jan 8 1998	Brief amicus curiae of Liberty Counsel filed.
	Jan 9 1998	Joint appendix filed.
	Jan 9 1998	Brief of petitioners National Endowment for the Arts, et al. filed.
	Jan 9 1998	LODGING consisting of ten copies of Exhibit B and Exhibit F to Cole Delclaration submitted by the Solicitor General.
	Jan 9 1998	LODGING consisting of ten copies of 8 1/2 x 11 blue brochure entitled National Endowment for the Arts Grants to Organizations 1999, submitted by the Solicitor General.
	Jan 9 1998	Brief amicus curiae of National Family Legal Foundation (To BE Reprinted) filed.
	Jan 9 1998	Brief amicus curiae of American Center for Law Justice filed.
	Feb 5 1998	LODGING consisting of twenty copies of a letter from General Andrew Fois to Sidney Yates, 10/5/95, submitted by counsel for the respondents.
	Feb 6 1998	Motion of Family Research Institute of Wisconsin for

No. 97-371-CFX

Entry	Date	Proceedings and Orders
		leave to file a brief as amicus curiae filed.
	Feb 6 1998	Brief of respondents Karen Finley, et al. filed.
	Feb 6 1998	Brief amici curiae of New School for Social Research, et al. filed.
	Feb 6 1998	Brief amici curiae of Claes Odlenburg, et al. filed.
	Feb 6 1998	Brief amicus curiae of Americans United for Separation of Church and States filed.
	Feb 6 1998	Brief amici curiae of American Association of University Professors, et al. filed.
	Feb 6 1998	Brief amici curiae of Volunteer Lawyers for the Arts, et al. filed.
	Feb 6 1998	Record filed.
	Feb 6 1998	Brief amicus curiae of Rockefeller Foundation filed.
	Feb 6 1998	Brief amicus curiae of Twenty-Six Arts, et al. filed.
	Feb 23 1998	Motion of Family Research Institute of Wisconsin for leave to file a brief as amicus curiae GRANTED.
	Feb 23 1998	CIRCULATED.
	Mar 4 1998	Record filed.
	Mar 6 1998	Reply brief of petitioners National Endowment for the Arts, et al. filed.
	Mar 31 1998	ARGUED.
	Apr 10 1998	Motion of respondents for leave to file a supplemental brief after argument filed.

PETITION FOR WRIT OF CERTIORARI

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FILED

97-371 AUG 29 1997

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
PETITIONERS

v.

KAREN FINLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The National Foundation on the Arts and the Humanities Act authorizes the National Endowment for the Arts (NEA) to make monetary grants-in-aid that enable qualifying groups and individuals to undertake a variety of projects related to the arts.. The Act provides that, when issuing regulations and establishing procedures governing the grant application process, the Chairperson of the NEA shall ensure that

> artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. 954(d)(1). The question presented in this case is whether the statutory direction that the Chairperson shall "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" is unconstitutional on its face under the First Amendment and the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioners are the National Endowment for the Arts and Jane Alexander, in her official capacity as Chairperson of the National Endowment for the Arts. Respondents are Karen Finley, John Fleck, Holly Hughes, Tim Miller, and the National Association of Artists' Organizations.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the National Endowment for the Arts, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 100 F.3d 671. The memorandum opinion of the district court (Pet. App. 48a-89a) is reported at 795 F. Supp. 1457. The order of the court of appeals denying the petition for rehearing (Pet. App. 90a-95a) is reported at 112 F.3d 1015.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1996. A petition for rehearing was denied on May 1, 1997. Pet. App. 90a-95a. On July 23, 1997, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment states in relevant part:

> Congress shall make no law * * * abridging the freedom of speech.

The Fifth Amendment states in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

Section 5(d) of the National Foundation on the Arts and the Humanities Act of 1965 (NFAH Act), states in relevant part:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and

> (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. * * *.

20 U.S.C. 954(d). Other relevant provisions of the NFAH Act are appended (Pet. App. 96a-105a).

STATEMENT

Congress established the National Endowment for the Arts (NEA) to provide federal support, including funding, for artistic undertakings. See National Foundation on the Arts and the Humanities Act of 1965 (NFAH Act), Pub. L. No. 89-209, 79 Stat. 845, 20 U.S.C. 951 *et seq.* In 1990, Congress amended Section 5(d) of the NFAH Act to provide that the Chairperson's regulations and procedures shall ensure that "artistic excellence and artistic merit" are the criteria on which applications are judged, taking into consideration "general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. 954(d)(1). Respondents, who consist of four individual performance artists and an association of artists' organizations, brought a legal challenge to that provision, arguing that it constitutes a facial violation of the First Amendment and the Due Process Clause of the Fifth Amendment. The United States District Court for the Central District of California agreed and invalidated the provision. A divided court of appeals affirmed that judgment.

1. Congress created the National Foundation on the Arts and the Humanities to "develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States." NFAH Act § 4(b), 20 U.S.C. 953(b). Congress organized the NEA as a part of the Foundation. See NFAH Act § 5(a), 20 U.S.C. 954(a). Congress directed the NEA to "establish and carry out a program of * * * grants-in-aid" to qualifying applicants. NFAH Act § 5(c), 20 U.S.C. 954(c). Those grants-in-aid, which are distributed on a limited basis under selective criteria, are intended to support "groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts," in enumerated categories of artistic productions, projects, and workshops. See NFAH Act § 5(c), 20 U.S.C. 954(c).[1]

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[1] The NFAH Act originally identified five such categories. See NFAH Act § 5(c), 79 Stat. 846-847. Since 1965, Congress has modified and enlarged the categories to include the following:

> (1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;
>
> (2) projects and productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographic or economic reasons;
>
> (3) projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence;

Congress necessarily vested the National Endowment for the Arts with considerable discretion in the administration of the grants-in-aid program, which depends on a case-by-case evaluation of applications, is subject to available appropriations, and can provide funding to only a small fraction of the applicants who seek public support. Congress has authorized the Chairperson of the Endowment "to prescribe such regulations as the Chairperson deems necessary governing the manner in which the Chairperson's functions shall be carried out." NFAH Act § 10(a)(1), 20 U.S.C. 959(a)(1). The Chairperson has codified regulations governing certain agency operations, see 45 C.F.R. Pt. 1150 (1996), but sets forth most of the

---

> (4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community;
>
> (5) projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts;
>
> (6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;
>
> (7) programs for the arts at the local level;
>
> (8) projects that enhance managerial and organizational skills and capabilities;
>
> (9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purpose of broadening public access to the arts; and
>
> (10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection.

See NFAH Act § 5(c)(1)-(10), 20 U.S.C. 954(c)(1)-(10). The Act defines many of the relevant statutory terms, including "the arts," "production," "project," and "workshop." NFAH Act § 3(b), (c), (d), and (f), 20 U.S.C. 952(b), (c), (d), and (f).

guidance on the grant-in-aid application and selection process through more informal means, such as application guidelines, which are provided on request to grant applicants.

Since 1965, Congress has occasionally amended the NFAH Act to provide, among other things, legislative guidance with respect to the administration of the grants-in-aid program. See, *e.g.*, Arts, Humanities, and Museums Amendments of 1990 (1990 Amendments), Pub. L. No. 101-512, 104 Stat. 1960. The 1990 Amendments are of particular interest in this case. Before 1990, the Chairperson had made the ultimate decisions on grant applications, see NFAH Act § 5(c), 20 U.S.C. 954(c) (1988), based on the recommendations of a 26-member National Council on the Arts (Council), see NFAH Act § 6, 20 U.S.C. 955 (1988), and the optional utilization of experts, including peer review panels, see NFAH Act § 10(a)(4), 20 U.S.C. 959(a)(4) (1988). Until 1990, Section 5(d) of the NFAH Act simply provided as follows:

> No payment may be made to any group under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations and procedures established by the Chairperson.

20 U.S.C. 954(d) (1988).

The 1990 Amendments modified Section 5(d) to state in relevant part as follows:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that —
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and
>
> (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. * * *.

20 U.S.C. 954(d). The 1990 Amendments, among other things, also modified the provisions governing the use of experts and consultants by generally requiring the Chairperson to "utilize advisory panels to review applications, and to make recommendations to the National Council on the Arts." NFAH Act § 10(c), 20 U.S.C. 959(c) The 1990 Amendments also directed the Chairperson to issue regulations and establish procedures to ensure that those panels reflect "diverse artistic and cultural points of view" and include "representation of lay individuals who are knowledgeable about the arts." NFAH Act § 10(c)(1) and (2), 20 U.S.C. 959(c)(1) and (2).

The 1990 Amendments were prompted in part by public objections to certain controversial artistic projects that had received NEA funding. The objections focused on a career retrospective exhibit of Robert Mapplethorpe's works, which included homoerotic photography, and an exhibit (funded by a subgrant to a visual art center) that included Andres Serrano's "Piss Christ," a photograph of a crucifix immersed in the artist's urine. See, *e.g.*, 135 Cong.

Rec. 9788-9789, 10,323-10,325, 14,431-14,433 (1989). Congress's amendment of Section 5(d) of the NFAH Act reflected a compromise among various perspectives on whether and how to impose greater control over the grant-in-aid award process. See, *e.g.*, 136 Cong. Rec. H9406-H9463 (daily ed. Oct. 11, 1990) (debates on proposed amendments); 136 Cong. Rec. H9673-H9684 (daily ed. Oct. 16, 1990) (same).

2. The four individual respondents in this case had filed applications for federal grants-in-aid under the NEA's Solo Theater Artists Category at the time that Congress was considering the 1990 Amendments. The NEA denied their applications, and they brought suit in district court, alleging, among other things, that the NEA had violated the First Amendment and the NFAH Act by denying their applications on political grounds. After Congress enacted the 1990 Amendments, the artists' association joined the individual respondents in an amended complaint alleging that Section 5(d)(1)—which provides for "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public"—facially violates the First and Fifth Amendments. See Pet. App. 48a-49a, 53a-54a.

3. The government moved for judgment on the pleadings with respect to the individual respondents' claims relating to the government's denial of their grant applications. The district court denied the government's motion except in one minor respect, Pet. App. 56a-69a, and the government and the individual respondents ultimately settled those claims. At the same time that the government moved for judgment on the pleadings, respondents moved for summary judgment on their facial constitutional challenge to Section 5(d)(1). The district court granted that

motion and enjoined the NEA from enforcing the language added by the 1990 Amendments. See Pet. App. 69a-88a.[2]

The district court began by rejecting the government's construction of Section 5(d)(1). The government had argued that Section 5(d)(1) did not necessarily require the Chairperson to make specific "decency and respect" determinations in awarding grants and, accordingly, that any constitutional issue arising from such a construction could be avoided. See Pet. App. 74a-75a. The government specifically cited the NEA's determination that it could satisfy Section 5(d)(1) by structuring the grant selection process, including the provision for diverse composition of advisory panels, so that general standards of decency and respect for diverse beliefs and values of the American public would be implicitly reflected in the consensus judgments of the decisionmakers. *Ibid.* The court found that interpretation unpersuasive, ruling that Congress had indicated that "'decency' and 'respect' for diverse beliefs are factors to be considered in determining 'artistic merit,'" *id.* at 75a, and that those factors must receive explicit consideration, *id.* at 76a.

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[2] The district court rejected the government's argument that respondents lacked standing to bring this suit. Pet. App. 70a-74a. The court stated that two of the individual respondents (Hughes and Miller) satisfied Article III standing requirements because they had received NEA grants at the time of the suit and they claimed that Section 5(d)(1) had restricted their expressive conduct. The court held that the artists' association, which included NEA applicants and grant recipients among its members, also had standing. Pet. App. 72a-74a.

Turning to the constitutional arguments, the district court first ruled that Section 5(d)(1) violates the Due Process Clause of the Fifth Amendment because the requirement that the Chairperson take into account "general standards of decency" is impermissibly vague. Pet. App. 76a-78a. According to the court, "the decency provision fails adequately to notify applicants of what is required of them or to circumscribe NEA discretion." *Id.* at 78a. The court also concluded that Section 5(d)(1) violates the First Amendment. *Id.* at 88a. The court reasoned that "government funding of the arts is subject to the constraints of the First Amendment," *id.* at 87a, that Section 5(d)(1)'s "decency and respect" provision "clearly reaches a substantial amount of protected speech," *id.* at 88a, and that Section 5(d)(1) therefore "violates the First Amendment for overbreadth and cannot be given effect," *ibid.*

4. The government appealed the district court's grant of partial summary judgment on respondents' claims that Section 5(d)(1), on its face, violates the First Amendment and the Due Process Clause. A divided court of appeals affirmed "essentially for the reasons stated by the district court." Pet. App. 3a. Like the district court, the court of appeals rejected the government's construction of Section 5(d)(1). *Id.* at 7a-17a. The court of appeals concluded that Section 5(d)(1) requires the Chairperson, National Council, and panels to

> examine each grant application to determine if it comports with "general standards of decency" and shows "respect for diverse beliefs and values" as they subjectively understand these terms.

Id. at 17a. Based on that construction, the court ruled that Section 5(d)(1) is unconstitutional. *Id.* at 15a-27a.

The court of appeals concluded that Section 5(d)(1) is void for vagueness under the First Amendment and the Due Process Clause of the Fifth Amendment. Pet. App. 15a-19a. It ruled, primarily on the basis of this Court's decision in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), which rejected a vagueness challenge to a noise ordinance, that grant limitations are subject to vagueness principles. Pet. App. 15a. The court of appeals then concluded that the phrase "decency and respect for the diverse beliefs and values of the American public" is "inherently ambiguous" and "impossible to define." *Id.* at 17a-18a. The court stated:

> Since it is not susceptible to objective definition, the "decency and respect" standard gives rise to the danger of arbitrary and discriminatory application. It grants government officials power to deny an application for funding if the application offends the officials' subjective beliefs and values. Inevitably, NEA's decision not to fund a particular artist or project as indecent or disrespectful will depend in part on who is judging the application and whether that official agrees with the artist's point of view.

Id. at 18a-19a (footnote omitted). The court concluded that, "[w]here First Amendment liberties are at stake, such a grant of authority violates fundamental principles of due process." *Id.* at 19a.[3]

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[3] The court saw no similar problem with applying Section 5(d)(1)'s "artistic excellence" and "artistic merit" criteria, reasoning that the relevant "decision makers possess an expertise

The court of appeals recognized that its holding that Section 5(d)(1) "is unconstitutionally vague effectively disposes of this case." Pet. App. 20a. The court nevertheless stated that "the First Amendment's prohibition on content- and viewpoint-based restrictions provides an alternate ground for [its] decision." *Ibid.* (footnote omitted). The court of appeals rested its analysis in that respect on the premise that the government may not impose content-based restrictions on protected speech unless the government demonstrates that the restrictions advance a compelling interest and are narrowly tailored to serve that interest. *Ibid.*

The court of appeals stated that the "presence of government funding alters this framework somewhat," because "[t]he government may make content-based choices 'when it is the speaker or when its enlists private entities to convey its own message.'" Pet. App. 21a, quoting *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2518 (1995). The court noted that "when the government appropriates public funds to establish a program it is entitled to define the limits of that program." Pet. App. 21a, quoting *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991). The court nevertheless concluded that "[g]overnment funding does not invariably justify government control of the content of speech." *Ibid.*

The court of appeals stated that "*Rust* and *Rosenberger* identify two related contexts in which the government may subsidize speech only if it does so in

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in determining 'artistic excellence and artistic merit' that will guide their application of those criteria." Pet. App. 19a n.18.

a way that is viewpoint-neutral." Pet. App. 22a. According to that court,

> Neutrality may be required because the area is a "traditional sphere of free expression," *Rust*, 500 U.S. at 200, or because the government has declared its intention to "encourage a diversity of views from private speakers." *Rosenberger*, * * * 115 S. Ct. at 2519.

Id. at 22a. The court of appeals concluded that "[b]oth approaches support the district court's conclusion that government funding of the arts, in the circumstances of this case, must be viewpoint-neutral." *Ibid.*

The court of appeals reasoned that "the arts, no less than a university, are 'at the core of a democratic society's cultural and political vitality,'" and that "the NEA's purpose is to support a diverse array of artistic expression." Pet. App. 22a. The court further concluded that Section 5(d)(1)'s "decency and respect" provision imposes impermissible viewpoint discrimination on grant applicants. *Id.* at 26a. The court of appeals ruled that, "[b]ecause the government has made no attempt to articulate a compelling interest served by the provision, [Section 5(d)(1)] cannot survive strict scrutiny." *Ibid.* (footnotes omitted).

Judge Kleinfeld dissented. Pet. App. 27a-47a. He recognized that "[a]rtists, and for that matter, non-artists, are constitutionally entitled to express themselves indecently and disrespectfully towards the beliefs and values of as much of the American public as they like." *Id.* at 28a. He concluded, however, that while the First Amendment prohibits censorship of indecent expression, it does not require the government to fund such speech. *Id.* at 29a.

Judge Kleinfeld stated that when the government administers a grant program for the arts, its power to "consider content and viewpoint depends on whether the money it gives out is generally available to all who meet some basic standard, or whether it is a prize given to a select few." Pet. App. 29a. In his view, when the government awards artistic grants on a selective basis, it must inevitably draw distinctions among the applicants based on the government's objectives in providing the financial subsidy. See *id.* at 29a-36a. Hence, it may properly discriminate "by content and viewpoint." *Id.* at 36a. He accordingly rejected the majority's conclusion that Section 5(d)(1) results in impermissible viewpoint regulation.

Judge Kleinfeld also rejected the majority's conclusion that Section 5(d)(1) is void for vagueness. Pet. App. 38a-41a. He acknowledged that Section 5(d)(1)'s "decency and respect" provision is imprecise, but he noted that the criteria for awarding prizes for artistic achievement—such as "artistic excellence and artistic merit"—are inevitably imprecise. *Id.* at 38a-40a. He concluded that, in any event, constitutional vagueness principles, which apply to direct regulation of speech, do not apply to grants awarded on selective criteria. *Id.* at 40a-41a. "An artist applying for an NEA grant has no formula, and is not entitled to one, for the painting or performance which will produce a grant." *Id.* at 41a.

Furthermore, Judge Kleinfeld stated that "the majority has found prohibitions in the statute which are not there." Pet. App. 41a. He noted that Section 5(d)(1), which reflects Congress's desire to exercise greater control over the NEA's expenditures of taxpayer money, does not prohibit the NEA from providing grants to support indecent or offensive art.

Instead, Section 5(d)(1) merely requires that the NEA ensure that "general standards of decency and respect for the diverse values and beliefs of the American public" are "tak[en] into consideration" as relevant factors in the grant selection process. *Id.* at 41a-43a.

5. The government filed a petition for rehearing and a suggestion of rehearing en banc. The court of appeals denied the petition and suggestion. Pet. App. 90a-91a. Judge O'Scannlain dissented in an opinion in which Judges Kozinski and Kleinfeld joined. *Id.* at 92a-95a. The dissenting judges concluded that the panel's decision gives the NEA statute "an implausible construction," *id.* at 92a, applies "the 'void for vagueness' doctrine where it does not belong," *id.* at 93a, and extends "standard First Amendment principles to a situation that the First Amendment doesn't cover," *id.* at 95a.

REASONS FOR GRANTING THE PETITION

The court of appeals has held that Section 5(d)(1) of the National Foundation for the Arts and Humanities Act is unconstitutional on its face under the First Amendment and the Due Process Clause of the Fifth Amendment. That court's decision, which renders a provision of an Act of Congress void in all its applications, is incorrect. The consequences are important. The court of appeals' ruling prevents Congress from making a legitimate legislative choice respecting the expenditure of public funds, a matter over which Congress has broad power. This Court is the final arbiter of the question whether Congress has transgressed constitutional limitations. In the face of the court of appeals' ruling, the Court should determine

whether Section 5(d)(1) violates the First and Fifth Amendments.

1. The court of appeals' decision is flawed for three basic reasons. First, the court gave Section 5(d)(1) an "implausible construction" that does not accurately describe the role of Section 5(d)(1) in the NEA's process for awarding grants. Pet. App. 92a (O'Scannlain, J., dissenting from the denial of rehearing). Second, the court of appeals misapplied this Court's decisions in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), and *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995), to the NEA's grant program, which selectively awards financial aid to qualifying applicants on the basis of legislatively prescribed aesthetic criteria. Third, the court mistakenly applied the "void for vagueness" doctrine to the NEA program, which does not implicate the concerns that underlie that doctrine.

a. The court of appeals erred in holding that Section 5(d)(1) of the NFAH Act requires that "the Chairperson, Council, and advisory panels must examine each grant application to determine if it comports with 'general standards of decency' and shows 'respect for diverse beliefs and values' as they subjectively understand these terms." Pet. App. 17a. The majority's construction is inconsistent with the plain language of Section 5(d)(1), which has a much more limited reach.

Section 5(d), as enacted in 1965, provided that the NEA could provide grants only upon an application

submitted in accordance with NEA regulations and procedures. The 1990 Amendments modified Section 5(d) to additionally provide as follows:

> *In establishing such regulations and procedures*, the Chairperson shall ensure that—
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration* general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. 954(d) (emphasis added). The limits of Section 5(d)(1)'s specific instructions are clear. It directs the Chairperson, in establishing regulations and procedures for judging NEA grant applications, to ensure that: (a) applications are judged on the criteria of artistic excellence and artistic merit; and (b) "general standards of decency and respect for the diverse beliefs and values of the American public" are "tak[en] into consideration."

As Judge O'Scannlain observed, Section 5(d)(1) does not say that "the NEA must use 'decency and respect' as the decisive criterion for awarding grants." Pet. App. 92a. Rather, Section 5(d)(1) directs the Chairperson to ensure that those considerations are included in fashioning the NEA's process for awarding financial aid. The Act, by its terms, gives the Chairperson considerable discretion in determining how to ensure that "decency and respect for diverse beliefs and values" are taken into consideration in the grant awarding process. The court of appeals erred in holding that the NEA could implement Section 5(d)(1) in only one way—by "examin[ing] each grant application to determine if it comports with 'general stan-

dards of decency' and shows 'respect for the diverse beliefs and values,'" Pet. App. 17a, and automatically rejecting each application that does not. The Chairperson has reasonably construed Section 5(b)(1), which merely provides for those factors to be "tak[en] into consideration," not to impose such an inflexible mandate.

b. The Constitution does not bar Congress from utilizing asethetic and similar criteria embodying notions of "decency and respect for the diverse beliefs and values of the American public" in awarding grants of public funds to support the arts. The flaws in the court's analysis are most starkly evident if one first examines the court's holding that Section 5(d)(1) violates the First Amendment by imposing impermissible content-based and viewpoint-based restrictions. See Pet. App. 20a-26a.

The court of appeals ruled that Section 5(d)(1) is facially unconstitutional because, it believed, that provision violates a First Amendment principle that government funding of the arts "must be viewpoint-neutral." Pet. App. 22a. We do not agree that Section 5(d)(1) must be understood to impose "viewpoint" restrictions in the sense that term is used in other settings. In the first place, Section 5(d)(1) can be construed to employ "decency and respect for the diverse values and beliefs of the American public" as aesthetic concepts or guideposts. Construed in that way, Section 5(d)(1) addresses essentially the mode or form, rather than the content, of the expressive activity. Cf. *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675, 683-685 (1986); *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 743 n.18 (1978) (opinion of Stevens, J.).

Moreover, even if, for example, "decency" is regarded as addressing the content of a work of art, it

does not necessarily extend to viewpoints on particular subjects. Similarly, "respect for the diverse beliefs and values of the American public" can be understood to refer to the range of subjects that NEA-funded artistic endeavors might embrace and the range of audiences those endeavors might reach, and to embody a resulting recognition that artistic excellence and merit under a program of public funding should be considered in that broader public context.[4] Understood in that way, Section 5(d)(1) does take into account public appreciation and expand the criteria of artistic excellence and merit beyond those that might be utilized in more focused or specialized settings, but without imposing particular viewpoint restrictions.

Nothing in the First Amendment bars Congress from defining the parameters of its program for funding of the arts in that manner. The NFAH Act establishes a federal program in which the NEA selectively awards a limited amount of public funds to grant applicants based on a particularized determina-

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[4] That recognition is also reflected in the Act's declaration of findings and purpose. See NFAH § 2(6), 20 U.S.C. 951(6) ("The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups."); NFAH § 2(9), 20 U.S.C. 951(9) ("Americans should receive in school, background and preparation in the arts and humanities to enable them to recognize and appreciate the aesthetic dimensions of our lives, the diversity of excellence that comprises our cultural heritage, and artistic and scholarly expression."); NFAH § 2(10), 20 U.S.C. 951(10) ("It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work.").

tion of the relative artistic merit of the applicants' proposed undertakings. In determining what projects or programs should receive funding, the NEA must necessarily make funding judgments based on the content of the applicants' proposals. Congress has established statutory criteria to guide the NEA in making those judgments, as Congress necessarily must do to guide the agency's selective determination of which few applications to fund.

The Court made clear in *Rust* v. *Sullivan*, *supra*, that Congress may award grants using criteria that are based on the content of speech without violating the First Amendment:

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. §4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.

500 U.S. at 194. As the Court noted, it has "soundly rejected" the proposition that "if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights." *Ibid.*, citing *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983); *Harris* v. *McRae*, 448 U.S. 297 (1980); and *Maher* v. *Roe*, 432 U.S. 464 (1977).

Under the Court's rationale in *Rust* and the cases on which it relied, Congress may fund the artistic activities that it believes should be encouraged in the broader public interest through the application of aesthetic and related criteria for awarding grants. That is what Congress did here when it directed the Chairperson to ensure in the NEA's regulations and procedures that the NFAH Act funds artistic activities based on "artistic excellence and artistic merit," additionally directing that the Chairperson take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public." NFAH Act § 5(d)(1), 20 U.S.C. 954(d)(1). Those provisions furnish guidance on the types of art that are eligible for federal subsidies. They thereby implement the NFAH Act's declaration of findings and purposes, as amended in 1990, which states:

> Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines.

NFAH Act § 2(5), 20 U.S.C. 951(5).

The court of appeals nevertheless concluded that Section 5(d)(1) is unconstitutional in light of the Court's subsequent decision in *Rosenberger* v. *Rector and Visitors of the University of Virginia*, *supra*, which held that the University of Virginia, a public institution, violated the First Amendment by refusing to provide money from its Student Activity Fund to finance a Christian student organization's publication. See 115 S. Ct. at 2520. That decision,

however, addressed a situation that is quite different from the one presented here.

In *Rosenberger*, the University of Virginia provided funding to student organizations for the purpose of creating what was, in essence, a public forum. 115 S. Ct. at 2516-2520. As the Court explained, the University of Virginia had funded the publications of virtually all student organizations that were "related to the educational purpose of the University," *id.* at 2514, including 118 of the 135 groups that had applied for money during the 1990-1991 academic year, *id.* at 2515. The Christian student organization was denied funding solely because its publication adopted the "prohibited perspective" of expressing a belief in a deity. *Id.* at 2515, 2517-2518. In this case, by contrast, Congress has articulated a general standard of artistic excellence and merit that takes into account decency and diverse values and beliefs. It does not single out any "prohibited perspective."

Viewed more broadly, the Court's decision in *Rosenberger* did not repudiate the general principle, articulated in *Rust* and other cases, that Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest." *Rust*, 500 U.S. at 193. Rather, *Rosenberger* addressed a particular problem arising from the nature of the particular funding program before it: The University could not simultaneously create a forum "to encourage a diversity of views from private speakers" and at the same time "silence the expression of selected viewpoints" within that forum. 115 S. Ct. at 2519.

In this case, the central purpose of the NFAH Act's grant program is not to create a public forum. Rather, Congress fashioned a highly selective grant-in-aid process, which provides funds to specific

categories of artistic projects, in order to, *inter alia*, "complement, assist, and add to programs for the advancement of * * * the arts by local, State, regional, and private agencies and their organizations," "fulfill [the Federal Government's] educational mission, achieve an orderly continuation of free society," "provide models of excellence to the American people," "transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art." NFAH Act § 2(5) and (11), 20 U.S.C. 951(5) and (11). The 1990 amendments to Section 5(d) set forth general criteria of artistic excellence and merit designed to ensure that the program of public funding for the arts will "serve [those] public purposes the Congress define[d]." NFAH Act § 2(5), 20 U.S.C. 951(5). That action does not transgress the First Amendment.

c. The court of appeals' conclusion that Section 5(d)(1) is unconstitutionally vague is also incorrect. This Court has never held that the "void for vagueness" principles developed in cases involving regulation of speech apply to cases involving congressional funding limitations, and there is no warrant for doing so. Furthermore, even if those principles applied, Section 5(d)(1) is not facially unconstitutional, because the NEA may implement the "decency and respect" provision through regulations and guidance that provide further precision.

The court of appeals reasoned that grant limitations are subject to vagueness principles primarily on the basis of the Court's decision in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), which rejected a civil rights demonstrator's argument that a local noise ordinance was void for vagueness. The Court stated

that laws imposing vague proscriptions on expressive conduct may raise constitutional issues because such laws may (1) "trap the innocent by not providing fair warning"; (2) allow "arbitrary and discriminatory enforcement"; and (3) thereby "inhibit the exercise of [First Amendment] freedoms." *Id.* at 108-109. The Court concluded that the noise ordinance was valid because it gave "fair notice," it contained "no broad invitation to subjective or discriminatory enforcement," and it does not "permit punishment for the expression of an unpopular point of view." *Id.* at 112-113.

The court of appeals erred at the outset in transplanting *Grayned*'s vagueness principles governing the regulation of expressive conduct to the NEA grant context. As the Court explained in *Grayned*, a vague law prohibiting expressive conduct can chill speech by leaving uncertain what is prohibited and by allowing arbitrary and discriminatory enforcement. The concern that a vague law may penalize lawful conduct is not present, however, in the context of the NEA grant award process, because Congress's use of imprecise terms in awarding grants does not penalize speech in any meaningful sense. See Pet. App. 93a-94a (O'Scannlain, J., dissenting from denial of rehearing); *id.* at 38a-41a (Kleinfeld, J. dissenting).

The Court's decisions support that conclusion. As noted above, the Court ruled in *Rust* that Congress may selectively fund family planning projects that do not engage in abortion activities. The Court explained that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program," 500 U.S. at 194, and that a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right," *id.*

at 193 (quoting *Regan* v. *Taxation with Representation*, 461 U.S. 540, 549 (1983)). If the government's decision against funding particular speech does not violate the First and Fifth Amendments, then imprecision as to what the government will fund likewise does not infringe First and Fifth Amendment rights. See *Rust*, 500 U.S. at 193 ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."); accord *Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980).

Even if vagueness principles applied in the NEA grant award context, the court of appeals erred in holding that Section 5(d)(1) is facially unconstitutional. Congress has stated the criteria for awarding NEA grants in terms of general standards, such as "artistic excellence" and "artistic merit," to give the NEA a necessary measure of discretion in awarding grants. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989) (Congress may "delegate power under broad general directives."). Despite the imprecision of the terminology, the court of appeals did not conclude that those grant criteria are unconstitutionally vague. See Pet. App. 18a n.18. There is no constitutional impediment to Congress further restricting the grant process to ensure that "general standards of decency and respect for the diverse beliefs and values of the American public" are "tak[en] into consideration" in the grant award process. See *Rust*, 500 U.S. at 195 n.4 ("Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.").

Even when legislation regulates speech, there is no requirement that the legislation provide "mathematical" precision. See *Grayned*, 408 U.S. at 110.

The question is whether the legislation is unconstitutionally vague in the "particular context" in which it is used. *Id.* at 112. Contrary to the court of appeals' reasoning, Section 5(d)(1) is capable of reasonable application in the grant award process. See Pet. App. 40a-43a (Kleinfeld, J., dissenting). Moreover, the NFAH Act authorizes the Chairperson "to prescribe such regulations as the Chairperson deems necessary governing the manner in which the Chairperson's functions shall be carried out." 20 U.S.C. 959(a)(1). Section 5(d)(1) therefore furnishes the Chairperson authority to adopt regulations to implement the "decency and respect" provisions and thereby eliminate any imprecision that might otherwise be present. Hence, there is no warrant for declaring Section 5(d)(1) facially unconstitutional on vagueness grounds without giving the NEA an opportunity to interpret and apply those terms in a specific factual setting.

2. The court of appeals' decision is not only wrong, but it also presents a matter of exceptional importance warranting Supreme Court review. The court of appeals has invalidated an Act of Congress on constitutional grounds. As this Court has repeatedly stated, judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." *E.g.*, *Rust*, 500 U.S. at 191; *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981); *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). It is this Court's special province to provide a final resolution of such disputes, especially where, as here, the appellate ruling of unconstitutionality has an impact beyond the geographic boundaries of the circuit

because the parties benefiting from the judgment include an association that has members throughout the Nation.

This case particularly warrants the Court's review because, as Judge O'Scannlain and Judge Kleinfeld independently noted, the court of appeals' decision is in tension with the decisions of two other courts of appeals. See Pet. App. 92a n.1 (O'Scannlain, J., dissenting from rehearing en banc); *id.* at 30a-32a (Kleinfeld, J., dissenting). The First Circuit rejected a First Amendment challenge to a State's denial of an NEA grant based on the judgment of the State's governor and the state arts commission that the work was indecent. *Advocates for the Arts* v. *Thomson*, 532 F.2d 792 (1st Cir.), cert. denied, 429 U.S. 894 (1976). The court of appeals reasoned:

> The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants.

Id. at 795.

The Seventh Circuit rejected a similar First Amendment challenge in *Piarowski* v. *Illinois Community College*, 759 F.2d 625, cert. denied, 474 U.S. 1007 (1985). The court of appeals concluded that the college administration did not violate the First Amendment by instructing the chairperson of the art department to relocate visual art that had generated complaints within the school community.[5] The court

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[5] The art work included depictions of "the naked rump of a brown woman," "a brown woman from the back, standing,

noted that the art was not obscene and "not wholly devoid of artistic merit, or at least artistic intention." *Id.* at 627. The court nevertheless concluded that the college authorities could require relocation of the art, stating:

> The college authorities were worried that [the art work], created by the chairman of the college's art department and exhibited in an alcove off the college's main thoroughfare, would convey an image of the college that would make it harder to recruit students, especially black and female students. If we hold that the college was forbidden to take the action it took to protect its image, we limit the freedom of the academy to manage its affairs as it chooses.

Id. at 629-630. In other words, the college was allowed to take into consideration the type of concerns embraced by Section 5(d)(1)'s provision for taking into account standards of decency and respect for the diverse values and beliefs of the American public.

The court of appeals' decision in this case will have important practical implications because it broadly limits the power of Congress to impose selection criteria on programs that fund expressive conduct. As the dissenting judges stated,

> The majority's opinion does far more than give a hostile construction to a Congressional enactment in order to create a conflict with other circuits and Supreme Court precedent, and overturn a law.

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naked except for stockings, and apparently masturbating," and "a brown woman * * * crouching in a posture of veneration before a robed white male whose most prominent feature is a grotesquely outsized phallus." 759 F.2d at 627.

> It sows the seeds of an imprudent First Amendment jurisprudence which will entangle and choke Congress' ability to control public funds used to sponsor any sort of free expression.

Pet. App. 95a (O'Scannlain, J., dissenting from the denial of rehearing en banc). Review by this Court is accordingly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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